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KAREN BERG, PHILIP BERG, MICHAEL BERG,
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10 UNITED STATES DISTRICT COURT
11 FOR THE CENTRAL DISTRICT OF CALIFORNIA

13 MARC AISEN

14 Plaintiff,

15 vs.

16 KAREN BERG; PHIL BERG;
MICHAEL BERG; YEHUDA
17 BERG; MADONNA CICCONE;
ERIN HEIDENREICH; HAYDEN
18 HOUSER; STEPHANIE HOUSER;
ASHTON KUTCHER; CINETIC;
19 KABBALAH CENTRE; LAUNCH
FIX,

20 Defendants.
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CASE NO. CV 11-2627 AHM (JCGx)

Hon. A. Howard Matz

NOTICE OF MOTION AND MOTION
OF DEFENDANTS KAREN BERG,
PHILIP BERG, MICHAEL BERG,
YEHUDA BERG AND KABBALAH
CENTRE INTERNATIONAL, INC. TO
DISMISS PURSUANT TO F.R.C.P.
12(b)(5); MEMORANDUM OF POINTS
AND AUTHORITIES; DECLARATION
OF OLGA FRAGOSO

Date: June 13, 2011

Time: 10:00 a.m.

Courtroom: 14

Complaint filed: March 29, 2011

1 TO PLAINTIFF MARC AISEN:

2 PLEASE TAKE NOTICE that on June 13, 2011 at 10:00 a.m., or as
 3 soon thereafter as the matter may be heard by the Honorable A. Howard Matz in
 4 Courtroom 14 of the United States District Court for the Central District of
 5 California, 312 N. Spring Street, Los Angeles, CA 90012, defendants Karen Berg,
 6 Philip Berg, Michael Berg, Yehuda Berg and Kabbalah Centre International, Inc.
 7 will and hereby do move, pursuant to Rule 12(b)(5) of the Federal Rules of Civil
 8 Procedure, to dismiss the complaint in this action for insufficient service of process
 9 or, in the alternative, to quash the purported service of summonses in this action on
 10 the ground that the summonses and complaint were not properly served.

11 This motion is exempt from Central District of California Local Rule 7-
 12 3 by operation of Local Rule 16-12(c), because Plaintiff is appearing *pro se* and is
 13 not an attorney.

14 This motion is based on this notice of motion, the attached
 15 Memorandum of Points and Authorities, the attached Declaration of Olga Fragoso,
 16 all pleadings and papers on file in this matter, and all other such evidence or
 17 argument as may be submitted to the Court at or prior to the hearing.

18 Dated: May 9, 2011

MANATT, PHELPS & PHILLIPS, LLP

21 By: /s/ Donald R. Brown
 22 Donald R. Brown
 23 Attorneys for *Defendants*
 24 KAREN BERG, PHILIP BERG,
 25 MICHAEL BERG, YEHUDA
 26 BERG, and KABBALAH
 27 CENTRE
 28

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1 **I. INTRODUCTION**

2 Defendants Karen Berg, Philip Berg, Michael Berg and Yehuda Berg
3 (the “Bergs”), and Kabbalah Centre International, Inc. (“Kabbalah Centre”), request
4 dismissal of this action under Rule 12(b)(5) of the Federal Rules of Civil Procedure
5 because Plaintiff has failed to properly serve a summons and complaint on any of
6 these defendants.¹ The only purported service that Kabbalah Centre and the Bergs
7 are aware of occurred on April 18, 2011, when a courier left a box containing
8 copies of the summons and complaint with a receptionist at the Kabbalah Centre,
9 without properly explaining what was purportedly being served on whom, and after
10 being told by the receptionist that she was not authorized to accept service of any
11 legal documents.

12 Plaintiff clearly has not effected personal service on Kabbalah Centre
13 or the Bergs. Nor has Plaintiff effected substitute service on Kabbalah Centre or
14 the Bergs. Moreover, any resort to substitute service would be premature in the
15 case of the Bergs because Plaintiff has not reasonably exhausted attempts to serve
16 them personally.

17 Accordingly, the action should be dismissed as to Kabbalah Centre and
18 the Bergs. At a minimum, Kabbalah Centre and the Bergs respectfully request that
19 the summonses left in the Kabbalah Centre reception area on April 18 be quashed.

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26 ¹ The complaint names “Kabbalah Centre and its affiliated entities” as
27 defendants. However, there is no legal entity named “Kabbalah Centre.”
28 Presumably, Plaintiff had in mind Kabbalah Centre International, Inc., which, purely
for the sake of convenience, will be referred to herein as “Kabbalah Centre.” It is
not clear what “affiliated entities” Plaintiff has in mind, and, thus, no response on
behalf of any such entity is possible at this time.

1 **II. RELEVANT FACTS**

2 Plaintiff filed the complaint in this action on March 29, 2011.² [Dkt
3 No. 1] On April 18, 2011, a man carrying a box entered the Kabbalah Centre
4 reception area in Los Angeles and told the receptionist that he had “subpoenas” for
5 Karen Berg, Michael Berg and Yehuda Berg. (Declaration of Olga Fragoso
6 (“Fragoso Decl.”), ¶ 3.) He did not mention Kabbalah Centre itself or Rabbi Philip
7 Berg. (*Id.*) The receptionist told him that none of the people he mentioned were
8 present and that she was not authorized to accept the documents. (*Id.*, ¶ 4.)
9 Without saying anything further, the man dropped the box at the receptionist’s feet,
10 departed, and has never returned. (*Id.*) As it turned out, the box contained, not
11 subpoenas, but five identical summonses and five copies of the complaint in this
12 action. (*Id.*, ¶ 5.)

13 The receptionist was not authorized to accept service of any legal
14 documents on behalf of Kabbalah Centre or the Bergs, nor has she ever been. (*Id.*,
15 ¶ 6.) Moreover, because the courier did not mention Rabbi Berg or Kabbalah
16 Centre when he dropped the box in the reception area (*id.*, ¶ 3), it is unclear if
17 Rabbi Berg and Kabbalah Centre were among the defendants Plaintiff intended to
18 serve at that time. Nonetheless, given Rabbi Berg’s relationship to Kabbalah
19 Centre and the other Bergs, and given that the box was left at the Kabbalah Centre,
20 defendants will give Plaintiff the benefit of the doubt and assume that Rabbi Berg
21 and Kabbalah Centre were among the targets of this clearly deficient attempt at
22 service.

23 Kabbalah Centre and the Bergs are not aware of any attempt by
24 Plaintiff to effect substitute service. Although the docket in this case reflects
25 recently-filed declarations from a purported process server stating that copies of the
26 summons and complaint were purportedly mailed to the Kabbalah Centre two

27 ² By this motion, Defendants do not address the “merits” of the Complaint, as
28 they are beyond the scope of this motion. Suffice to say, the claims are factually and
legally preposterous, and Defendants categorically reject them.

1 weeks ago, in fact no such documents have ever arrived by mail at the Kabbalah
2 Centre. (*Id.*, ¶ 7.)

3 4 **III. LEGAL STANDARD**

5 “A federal court is without personal jurisdiction over a defendant
6 unless the defendant has been served in accordance” with Rule 4 of the Federal
7 Rules of Civil Procedure. *S.E.C. v. Ross*, 504 F.3d 1130, 1138 (9th Cir. 2007).
8 “Without a proper basis for jurisdiction, or in the absence of service of process, the
9 district court has no power to render any judgment against the defendant's person or
10 property unless the defendant has consented to jurisdiction or waived the lack of
11 process.” *Id.* at 1138-39. Moreover, although Rule 4 is a flexible rule that should
12 be liberally construed, “neither actual notice nor simply naming the defendant in the
13 complaint will provide personal jurisdiction absent ‘substantial compliance with
14 Rule 4.’” *Benny v. Pipes*, 799 F.2d 489, 492 (9th Cir. 1986).

15 Once service is challenged, the plaintiff bears the burden of
16 establishing sufficiency of process. *Brockmeyer v. May*, 383 F.3d 798, 801 (9th
17 Cir. 2004). If the plaintiff fails to meet that burden, the court has broad discretion
18 to either dismiss the action without prejudice or retain the case but quash the
19 service of process. *Oyama v. Sheehan*, 253 F.3d 507, 513 (9th Cir. 2001); *see also*
20 5 C. Wright & A. Miller, Federal Practice and Procedure, § 1353, at 348 (2004).

21 22 **IV. ARGUMENT**

23 **A. Plaintiff Did Not Properly Serve the Bergs.**

24 **1. Plaintiff Did Not Personally Serve the Bergs.**

25 Personal service is only effectuated on a natural person when a copy of
26 the summons and complaint has either been (i) actually delivered to that person, (ii)
27 left at that person’s “dwelling or usual place of abode with someone of suitable age
28 and discretion who resides there,” or (iii) delivered to someone authorized by law to

1 accept service on the defendant's behalf. *See* Fed. R. Civ. Proc. 4(e); Cal. Code
2 Civ. Proc. §§ 415.10, 416.90.

3 There is no evidence that Plaintiff has effected personal service on the
4 Bergs under any these alternatives. Rather, the only known purported service on
5 the Bergs occurred when a courier left copies of the summons and complaint at a
6 place of business with someone who was not authorized to accept service on their
7 behalf and who had made her lack of authority clear to the courier.

8 2. Plaintiff Did Not Effectuate Substitute Service on the Bergs.

9 In certain circumstances under California law,³ service may be effected
10 by delivering the summons and complaint to someone other than the defendant (or
11 an individual authorized by law to receive service on the defendant's behalf), and
12 thereafter mailing additional copies to the defendant. *See* Fed. R. Civ. Proc. 4(e);
13 Cal. Code Civ. Proc. § 415.20. This method of service is referred to as "substitute
14 service." Plaintiff has not met this requirement either.

15 Before even *attempting* substitute service on a natural person, a
16 plaintiff must make a showing that the summons "cannot with reasonable diligence
17 be personally delivered" to that person. *See* Fed. R. Civ. Proc. 4(e); Cal. Code Civ.
18 Proc. § 415.20(b). Generally, at least two or three attempts to personally serve a
19 natural person "at a proper place" (like a residence or place of work) is necessary to
20 prove "reasonable diligence." *See Espindola v. Nunez*, 199 Cal. App. 3d 1389,
21 1392 (1988); *see also Stafford v. Mach*, 64 Cal. App. 4th 1174, 1182 (1998). The
22 plaintiff bears the burden of proving that reasonable attempts at personal service
23 were made before resorting to substitute service. *Evartt v. Superior Ct.*, 89 Cal.
24 App. 3d 795, 801 (1979).

25 Moreover, even assuming, *arguendo*, that Plaintiff had exhausted
26 reasonable efforts at personal service, he has not satisfied the follow-up steps for

27 _____
28 ³ Rule 4(e) allows for service by any means authorized under state law in the
state where the district court is located or where service is made.

1 effecting substitute service. To effectuate substitute service of a summons and
2 complaint on a natural person, a plaintiff must do the following:

- 3 1. Deliver the documents to the person's dwelling, usual place of
4 business, or usual mailing address;
- 5 2. Leave the documents with a "competent member of the household" or
6 person "apparently in charge of his office or place of business," *who*
7 *must be told what the papers are*; and
- 8 3. Thereafter, mail copies of the documents to wherever the copies were
9 left as described above.

10 Cal. Code Civ. Proc. § 415.20(b) (emphasis added); *see also Taskos Shipping &*
11 *Trading, S.A. v. Juniper Garden Town Homes, Ltd.*, 12 Cal. App. 4th 74, 85 (1993)
12 ("[A]lthough service may be completed by leaving a copy of the summons and
13 complaint at the business office of the person to be served, *a copy of the summons*
14 *must thereafter be mailed to the person to be served*") (emphasis in original);
15 *Khourie, Crew & Jaeger v. Sabek, Inc.*, 220 Cal. App. 3d 1009, 1013 (1990) ("The
16 evident purpose of Code of Civil Procedure section 415.20 is to permit service to be
17 completed upon a good faith attempt at a physical service on an actual person, plus
18 actual notification of the action by mailing the summons and complaint to the
19 appropriate party") (emphasis added).

20 Even assuming, *arguendo*, that dropping the box of documents at the
21 receptionist's feet at the Kabbalah Centre qualified as delivering documents to the
22 Bergs' place of business and leaving them with a person "apparently in charge," the
23 courier did not properly explain what the documents were, nor did he mention that
24 the documents were intended for Rabbi Berg in addition to the other Bergs. Rather,
25 he delivered five identical summonses, leaving it to guesswork which defendants
26 were purportedly being served. Moreover, it appears that Plaintiff never mailed a
27 copy of the summons and complaint to the Bergs at the Kabbalah Centre address
28 (where the documents were originally left). (*See* Fragoso Decl., ¶ 7.)

Accordingly, and regardless of whether Plaintiff had exercised the reasonable diligence necessary before resorting to substitute service, Plaintiff has not fulfilled the requirements for effectuating substitute service.

B. Plaintiff Did Not Properly Serve Kabbalah Centre.

1. Plaintiff Did Not Personally Serve Kabbalah Centre.

Under federal law, a corporation is personally served through delivery to “an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process.” Fed. R. Civ. Proc. 4(h)(1)(B). Similarly, under California law, personal service on a corporation may be delivered “[t]o the person designated as agent for service of process;” or “[t]o the president, chief executive officer, or other head of the corporation, a vice president, a secretary or assistant secretary, a treasurer or assistant treasurer, a general manager, or a person authorized by the corporation to receive service of process.” Cal. Code Civ. Proc. § 416.10.

The Kabbalah Centre receptionist does not hold any of the titles specified in Rule 4(h)(1)(B) or Code of Civil Procedure section 416.10, nor was she authorized to accept service on Kabbalah Centre’s behalf. Thus, Kabbalah Centre was not personally served with process.

2. Plaintiff Did Not Effectuate Substitute Service on Kabbalah Centre.

As with individuals, corporations may be served via substitute service under California law (and, therefore, under Rule 4(h)(1)(A)), *if* certain conditions are met. Specifically, in order to effectuate substitute service on a corporate defendant, a plaintiff must:

1. Leave a copy of the summons and complaint during usual office hours in the defendant’s office; or
2. If no physical address is known, leave a copy of the summons and complaint may at the defendant’s usual mailing address, other than a United State Postal Service post office box, with the person who is apparently in charge thereof; and

3. After a copy of the summons and complaint is left either at the defendant's office or at his or her mailing address, mail other copies (prepaid by first class mail) to such person at the place where the copies were left.

Cal. Code Civ. Proc. § 415.20(a). As with substitute service on an individual, substitute service on an entity is ineffective without mailing a copy of the summons and complaint to the entity defendant. *See Taskos Shipping & Trading, S.A*, 12 Cal. App. 4th at 85; *Khourie, Crew & Jaeger*, 220 Cal. App. 3d at 1013.

Again, as with the Bergs, Kabbalah Centre has no record of receiving by mail any copies of the summons and complaint. (*See* Fragoso Decl., ¶ 7.) Thus, service on Kabbalah Centre (and its unidentified "affiliates") is ineffective and should be quashed.

V. CONCLUSION

For the foregoing reasons, the Bergs and Kabbalah Centre respectfully request the Court dismiss the action as to them or, alternatively, enter an Order quashing the purported service of summonses as to them.

Dated: May 9, 2011

MANATT, PHELPS & PHILLIPS, LLP

By: /s/ Donald R. Brown
 Donald R. Brown
 Attorneys for *Defendants*
 KAREN BERG, PHILIP BERG,
 MICHAEL BERG, YEHUDA BERG and
 KABBALAH CENTRE

DECLARATION OF OLGA FRAGOSO

I, Olga Fragoso, declare:

1. Since June 12, 2009, I have been employed as a receptionist for Kabbalah Centre International, Inc. at 1062 South Robertson Boulevard in Los Angeles, California ("Kabbalah Centre"). I have personal knowledge of the facts stated in this declaration, and if called as a witness, I could competently testify to those facts.

2. I make this declaration in support of the motion by defendants Karen Berg, Michael Berg, Yehuda Berg and Rabbi Philip Berg (collectively, the "Bergs") and defendant Kabbalah Centre to dismiss under Rule 12(b)(5) of the Federal Rules of Civil Procedure.

3. On April 18, 2011, I was in the Kabbalah Centre reception area when a man carrying a box entered the reception area and said that he had "subpoenas" to serve on Karen Berg, Michael Berg and Yehuda Berg. He made no mention of Rabbi Berg or Kabbalah Centre itself.

4. I told the man that none of the people he mentioned were present and, further, that I was not authorized to accept service of process on their behalf. Without saying anything further, the man dropped the box at my feet, departed, and, to the best of my knowledge, has never returned to the Kabbalah Centre.

5. The box contained five identical summonses and five copies of the complaint in this action.

6. I am not, and have never been, authorized to accept service of process on behalf of Kabbalah Centre or the Bergs.

7. As part of my duties as receptionist, I open all mail sent to the Kabbalah Centre address. To the best of my knowledge, no copies of the summons and complaint in this action have been mailed to that address or to any other address affiliated in some fashion with Kabbalah Centre.

1 I declare under penalty of perjury pursuant to the laws of the State of
2 California that the foregoing is true and correct. Executed this 9th day of May,
3 2011, at Los Angeles, California.

4
5 Dated: May 9, 2011

By: 

Olga Fragoso

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PROOF OF SERVICE

I, Carlyn Falls, declare as follows:

I am employed in Los Angeles County, Los Angeles, California. I am over the age of eighteen years and not a party to this action. My business address is MANATT, PHELPS & PHILLIPS, LLP, 11355 West Olympic Boulevard, Los Angeles, California 90064-1614. On May 9, 2011, I served the within:

**NOTICE OF MOTION AND MOTION OF DEFENDANTS
KAREN BERG, PHILIP BERG, MICHAEL BERG, YEHUDA
BERG AND KABBALAH CENTRE INTERNATIONAL, INC.
TO DISMISS PURSUANT TO F.R.C.P. 12(b)(5);
MEMORANDUM OF POINTS AND AUTHORITIES;
DECLARATION OF OLGA FRAGOSO**

on the interested parties in this action addressed as follows:

**MARC AISEN
1902 Pacific Avenue, Apt. 13
Venice, CA 90291
Phone: (917) 557-1574
*In Pro Se***



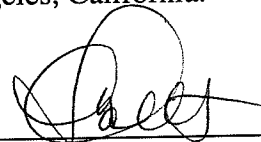
(BY MAIL) By placing such document(s) in a sealed envelope, with postage thereon fully prepaid for first class mail, for collection and mailing at Manatt, Phelps & Phillips, LLP, Los Angeles, California following ordinary business practice. I am readily familiar with the practice at Manatt, Phelps & Phillips, LLP for collection and processing of correspondence for mailing with the United States Postal Service, said practice being that in the ordinary course of business, correspondence is deposited in the United States Postal Service the same day as it is placed for collection.



(BY ELECTRONIC MAIL) By transmitting such document(s) electronically at [time] from my e-mail address, CFalls@manatt.com at Manatt, Phelps & Phillips, LLP, Los Angeles, California, to the person(s) at the electronic mail addresses listed above. The transmission was reported as complete and without error.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made and that the foregoing is true and correct.

Executed on May 9, 2011, at Los Angeles, California.



Carlyn Falls

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